2

No. 06-534

FILED
JAN 19 20

In The

Supreme Court of the United States

INITIATIVE AND REFERENDUM INSTITUTE, ET AL.,

Petitioners,

v.

GARY HERBERT, LIEUTENANT GOVERNOR OF UTAH; MARK SHURTLEFF, ATTORNEY GENERAL OF UTAH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

MARK L. SHURTLEFF
Utah Attorney General
ANNINA M. MITCHELL*
Utah Solicitor General
Attorneys for Respondents
160 East 300 South, 5th Floor
P.O. Box 140858
Salt Lake City, UT 84114-0858
(801) 366-0353
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the First Amendment prohibits a state from imposing both content- and viewpoint-based restrictions upon an initiative process with the purpose of diminishing the voice of voters who favor one viewpoint relative to those with an opposing viewpoint.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. Petitioners Lack Standing to Raise a First Amendment Claim on Behalf of Themselves or Potential Future Voters 4

A. Petitioners' Alleged Injury is Speculative and Their Speech is "Chilled" Only by Subjective Fear of Eventual Failure at the Ballot Box 4

B. Petitioners Cannot Now Assert the First Amendment Rights of Potential Future Voters 7

II. There is No Circuit Conflict about Whether Government Can, Consistent with the First Amendment, Dictate How – or If – a Citizens' Initiative Can Become Law 9

III. There is No Precedent For Invalidating Laws, Common Throughout the Country, that Require More Than a Majority Vote to Enact Legislation on Selected Topics 14

CONCLUSION 18

APPENDIX: Utah Constitution, Article VI, section 1 ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bogert v. Kinzer, 403 U.S. 914 (1971) 16

Braxton v. United States, 500 U.S. 344 (1991) 9

Brenner v. School District, 403 U.S. 913 (1971) 16

Conn v. Gabbert, 526 U.S. 286 (1999) 8

Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004) 8

Gordon v. Lance, 403 U.S. 1 (1971) 8, 14, 15, 16

Gratz v. Bollinger, 539 U.S. 244 (2003) 8

Initiative and Referendum Institute v. Walker, 450 F.3d 1082 (10th Cir. 2006) ..... *passim*

Laird v. Tatum, 408 U.S. 1 (1972) 4, 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 2

Marijuana Policy Project v. United States, 304 F.3d 82 (D.C. Cir. 2002) 10, 12, 13

McConnell v. Federal Election Commission, 540 U.S. 93 (2003) 7

Meese v. Keene, 481 U.S. 465 (1987) 6

Mihaly v. Westbrook, 403 U.S. 915 (1971) 16

Mize v. Alhambra City School District, 403 U.S. 927 (1971) 16

New York Times v. Sullivan, 376 U.S. 254 (1964) 6

Rimarcik v. Johansen, 403 U.S. 915 (1971) 16

TABLE OF AUTHORITIES – Continued

Page

Save Palisade FruitLands v. Todd, 279 F.3d 1204 (10th Cir. 2002) 10, 12

Steffel v. Thompson, 415 U.S. 452 (1974) 6

Taxpayers United for Assessment Cuts v. Austin, 994 F.2d 291 (6th Cir. 1993) 10

United States v. O'Brien, 391 U.S. 367 (1968) 17

Wellwood v. Johnson, 172 F.3d 1007 (8th Cir. 1999) 11

Whitmore v. Arkansas, 495 U.S. 149 (1990) 4

Wirzburger v. Galvin, 412 F.3d 271 (1st Cir. 2005), *cert. denied*, 126 S.Ct. 1165 (2006) 12, 13

STATE CASES

In re Matter of Contest of Certain Special Election, 659 P.2d 1294 (Ariz. App. 1982) 16

Santa Clara County Local Transport Authority v. Guardino, 902 P.2d 225 (Cal. 1985) 16

STATE STATUTES

Utah Code Ann. § 20A-7-201 (West 2004) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I 14

U.S. Const. art. II 14

U.S. Const. art. V 14

U.S. Const. art. VI 1

U.S. Const. amend. XIV 14

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. Amend. XXV 14

Utah Const. art. VI 1

Utah Const. art. XI 14

Utah Const. art. XXIII 1

INTRODUCTION

Respondent Utah officials file this brief in opposition to the Petition for a Writ of Certiorari to review the *en banc* decision of the United States Court of Appeals for the Tenth Circuit in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006). That opinion affirmed the Memorandum Opinion and Order of the United States District Court for the District of Utah, which is reported at 161 F. Supp. 2d 1307 (2001). Both are reprinted in Petitioners' Appendix ("Pet. App.").

STATEMENT OF THE CASE

The Utah Constitution provides that the citizens of Utah may directly initiate any desired legislation and cause it to be submitted to the people for adoption. Utah Const. art. VI, §§ 1(1)(b), 1(2)(a)(i)(A).[1] The state constitution itself can only be amended by the voters' approval of a ballot measure that originates as a resolution passed by a two-thirds vote in both houses of the Utah Legislature. Utah Const. art. XXIII, § 1.

In 1998, Utah voters amended article VI, section 1 of their constitution to add subsection (2)(a)(ii). It provides that any citizens' initiative to "allow, limit, or prohibit the taking of wildlife or the season or method for taking wildlife" must be adopted by two-thirds of those voting. Other citizens' initiatives need only pass by a majority vote. Utah Const. art. VI, § 1(2)(a)(i)(A).

[1] The text of article VI, section 1 of the Utah Constitution is included in the Appendix to this brief.

Petitioners brought this action, claiming, *inter alia,* that the supermajority vote requirement for wildlife initiatives is facially invalid because it infringes their First Amendment free speech rights. Respondents filed a Motion to Dismiss on the grounds that the Petitioners lacked standing and failed to state a claim under the First Amendment. The trial court held there was standing, Pet. App. 67-69, but upheld the 1998 state constitutional amendment. Petitioners stated no First Amendment claim because they were able to exercise, without restriction, their First Amendment free speech rights: "[Petitioners] can initiate and circulate petitions; they can engage in political discussions for or against any initiative; and they [can] raise money for and publically lobby for any initiative they bring to the ballot." Pet. App. 75. The district court also concluded no viewpoint or content is subjected to discrimination or kept from public discussion by the 1998 amendment. Pet. App. 75-76.

On appeal, the *en banc* Tenth Circuit first held that Petitioners had standing. Pet. App. 8-32. Though they had never attempted a wildlife initiative in Utah, had no specific plans to do so, and were discouraged from doing so only by the difficulty of ultimately securing the support of two-thirds of voters, Petitioners nonetheless had, in the panel's view, shown the "injury in fact" required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Pet. App. 8-19. Three judges dissented from the grant of standing. Pet. App. 46-64.

Next, the court held that the Utah constitutional provision does not implicate the First Amendment since the supermajority requirement restricts neither speech nor expressive conduct. Pet. App. 32-44. Writing for ten of the eleven members of the *en banc* panel, Judge Michael

McConnell reasoned that, although the supermajority requirement makes it more difficult to pass wildlife initiatives, it does not regulate or restrain speech about such matters. Pet. App. 7. In reaching this conclusion, the court distinguished between a state's laws creating a citizens' initiative process and protected speech associated with that process: "Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." Pet. App. 34.

The *en banc* panel rejected petitioners' radical theory that every structural feature of government that makes some political outcomes less likely than others violates the First Amendment by discouraging some speakers from engaging in protected speech. Pet. App. 36. In the panel's view, although the First Amendment ensures that all differing points of view can be aired, it does not ensure that all will be equally successful. Pet. App. 37-38.

Because Utah's constitutional provision regulates the conditions and process by which Utah voters can adopt wildlife legislation, not their political speech about wildlife issues, there was no regulation of speech based on content. Pet. App. 42-44. Thus, there was no occasion to reach petitioners' claim that the provision, despite its facial neutrality, was intended by its originators to disfavor anti-hunting advocacy. Pet. App. 43. The court nonetheless noted that the challenged Utah constitutional provision does not discriminate against an anti-hunting viewpoint, as it applies equally to initiatives to "allow" the taking of wildlife as to those to "limit" or "prohibit" it. Pet. App. 42-43.

For these reasons, the court affirmed dismissal of petitioners' suit for failure to state a First Amendment claim. Pet. App. 45.

REASONS FOR DENYING THE PETITION

I. Petitioners Lack Standing to Raise A First Amendment Claim on Behalf of Themselves or Potential Future Voters.

A. Petitioners' Alleged Injury is Speculative and Their Speech is "Chilled" Only by Subjective Fear of Eventual Failure at the Ballot Box.

In order for a federal court to exercise jurisdiction under Article III of the Constitution, plaintiffs must establish that they have suffered an "injury in fact" fairly traceable to the defendants' challenged action and redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks, citations, and footnote omitted). Alleged injury that is dependent on the "'some day' intentions" of plaintiffs is insufficient, *id.* at 564, as are allegations of possible future injury, *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), or "subjective chill," *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

Here, Petitioners attack a constitutional provision that requires a two-thirds vote to adopt any wildlife initiative, which they claim "chills" their speech in support of wildlife initiatives. Pet. App. 10. As the three dissenters

ably demonstrate, Pet. App. 46-55, Petitioners' allegations do not show an invasion of a legally protected interest.

Petitioners have never mounted a wildlife initiative campaign in Utah and have no specific plans to do so, which even the panel majority admits: "[Petitioners] do not tell us precisely what initiatives they would bring, or when; nor do they claim any certainty about their intentions." Pet. App. 17. Instead, they premise their claimed injury on a long and speculative chain of possible future events: they may wish to draft a wildlife initiative in Utah at some time in the future; they may secure enough signatures statewide to get that initiative on the general ballot;[2] and the initiative might secure more than half, but fewer than two-thirds, of the votes.

Other future events, however, are just as plausible: Petitioners never draft a wildlife initiative for Utah; or they draft one, but cannot secure enough signatures to put it before the voters; or their wildlife initiative reaches the general ballot, but garners less than a majority (and is not enacted) or more than a two-thirds supermajority (and is enacted). Petitioners' lack of success, in all but the last scenario, would not result from the challenged supermajority requirement. And in the last scenario, Petitioners would have succeeded; thus, there could be no injury at all.

In short, Petitioners' standing claim piles speculation upon speculation. It is premised on just the sort of "some day intentions" and "what-ifs" this Court has consistently held are insufficient to establish Article III standing.

---

[2] *See* Utah Code Ann. § 20A-7-201(2)(a) (West 2004) (setting signature requirements for statewide initiatives).

To excuse the hypothetical nature of their alleged injury, Petitioners assert that their advocacy of wildlife initiatives is "chilled." They rely on this Court's cases concluding that a plaintiff need not actually endure actual arrest, criminal prosecution, or other direct, adverse consequences to be afforded standing to raise a First Amendment claim. It is sufficient if there is an imminent threat of such harm flowing from the challenged provision if one exercises purported free speech rights. *E.g.*, *Meese v. Keene*, 481 U.S. 465, 472-73 (1987) (granting standing to legislator facing likely damage to professional reputation); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (granting standing to plaintiff threatened with criminal trespass prosecution); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (granting standing to plaintiff threatened with civil liability).

But Petitioners here need not choose between advocating in a wildlife initiative campaign and enduring an intolerable retaliatory action for doing so. The challenged provision imposes no burden or penalty for such advocacy. Instead, plaintiffs do not exercise their right to speak simply because they fear that any such campaign would ultimately not result in enactment of an initiative. In other words, they silence themselves because they believe their speech would not be successful at the ballot box. *See* Pet. 2-5, 28-29; Pet. App. 18-19.

This subjective chill due to mere discouragement, not to a credible threat of likely sanctions from the allegedly unconstitutional provision, is not a sufficient basis for

granting standing. *See Laird*, 408 U.S. at 13-14.[3] On this point, Respondents agree with the *en banc* panel majority:

> If all it took to summon the jurisdiction of the federal courts were a bare allegation that, as a result of government action, one is discouraged from speaking, there would be little left of the Article III threshold in First Amendment cases.

Pet. App. 12.

B. Petitioners Cannot Now Assert the First Amendment Rights of Potential Future Voters.

Before the Tenth Circuit, Petitioners claimed their own First Amendment rights to free speech in support of wildlife initiatives had been unconstitutionally burdened. *See* Pet. App. 10. Now, Petitioners repeatedly try to retool their case into one really involving the First Amendment rights of prospective voters who may, at some point in the future, vote in favor of a wildlife initiative. The supermajority requirement, Petitioners argue, will "diminish" or "dilute" the value of the votes such persons will cast because "it takes twice as many 'yes' votes as it does 'no' votes to pass such an initiative." Pet. 9. Petitioners therefore urge this Court to grant certiorari to "clarify" the free speech rights of these prospective voters. Pet. 18-21, 29.

There are several flaws in this desperate strategy. First, these Petitioners have no standing to assert a claim

---

[3] *See also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 228 (2003) (denying standing to plaintiffs who complained that campaign contribution limits deprived them "of equal ability to participate in the election process").

that the supermajority requirement violates the free speech rights of future supportive voters, who are not before the Court.[4] *See Gratz v. Bollinger*, 539 U.S. 244, 289 (2003); *Conn v. Gabbert*, 526 U.S. 286, 292-93 (1999). Second, Petitioners did not raise the issue in the court of appeals, and the Tenth Circuit did not rule on it.[5] This Court does not consider such issues. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (citing *Adarand Constr., Inc. v. Mineta*, 534 U.S. 103, 109 (2001)). Third, Petitioners have tendered no case demonstrating a circuit split on this belatedly-raised claim; not one of the courts of appeals in the cases Petitioners rely on actually addressed it. In fact, no court has invalidated a supermajority requirement under the First Amendment as an unconstitutional dilution of the votes of those favoring a ballot measure's passage.

In light of Petitioners' dubious standing to attack Utah's supermajority provision as violating their own or others' First Amendment rights, this case would be inappropriate for certiorari review even if there were a circuit conflict on the merits of the question presented.

---

[4] Compare *Gordon v. Lance*, 403 U.S. 1 (1971), in which the plaintiffs raising an equal protection claim were those who had actually voted for a bond initiative that ultimately was not enacted because the requisite supermajority was not reached.

[5] The same is true of Petitioners' newly-minted "limited public forum" argument, Pet. 22-25, and the argument that the supermajority requirement, like gerrymandering, is "better analyzed as involving viewpoint discrimination in the ballot box." Pet. 26-28.

II. There is No Circuit Conflict about Whether Governments Can, Consistent with the First Amendment, Dictate How – or If – a Citizens' Initiative Can Become Law.

The "principal purpose" for the exercise of this Court's discretionary jurisdiction is to resolve conflicts among the courts of appeals and state courts concerning federal law. *See Braxton v. United States*, 500 U.S. 344, 347 (1991). Despite Petitioners' labored attempt to construct one, there is no circuit conflict about whether governments can, without violating the First Amendment, limit enactment of certain citizens' initiatives into law. Petitioners tellingly cite no case striking down, as violative of the Free Speech Clause, a law that does so. Nor can they cite any precedent for the unspoken proposition that a citizens' initiative process is mandated by the First Amendment.

Notably, all of the cases Petitioners do rely on to demonstrate a purported conflict involve quite different laws. Unlike Utah's supermajority requirement, they either exclude entire topics from the initiative process or make it more difficult for initiatives on certain topics to get on the ballot. More importantly, however, the various conditions imposed on the citizens' initiative process in these cases have all been upheld under the Free Speech Clause. One opinion takes a slight detour in its First Amendment "approach," as Petitioners put it, Pet. 13, but all reach the same destination.

Far from being "extreme" as Petitioners charge, Pet. 9, 11, the Tenth Circuit's decision is purposefully consistent with those of the Eighth Circuit and the District of Columbia Circuit. *See* Pet. App. 34-35. These three courts of appeals have appropriately distinguished, for purposes of First Amendment analysis, between (a) facially neutral

laws setting conditions for law-making via citizens' initiatives and (b) laws restricting political speech associated with an initiative campaign. And they have correctly concluded that the former category imposes no burden or restraint on speech or expressive conduct.

In *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002), a federal statute prohibited any initiative in the District of Columbia that would lessen the penalties for, or legalize, controlled substances. The Marijuana Policy Project submitted to the District's Board of Elections the Medical Marijuana Initiative of 2002, which would have decriminalized the use of marijuana to alleviate specified disease symptoms. The Board refused to certify the initiative for inclusion on the ballot because of the statutory bar. The organization then sued, crying "viewpoint discrimination" prohibited by the First Amendment because the statute precluded their political speech advocating for the medical marijuana initiative.

The court of appeals unanimously disagreed, concluding that the federal statute restricts no speech since medical marijuana advocates remain free to lobby or petition Congress for such legislation. *Id.* at 85. The court pointed out that there was no known case striking down under the First Amendment a law limiting legislative authority, contrasting it with legislative advocacy. *Id.* "This is not surprising, for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Id.*; *accord Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1211 (10th Cir. 2002); *see Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) ("Because the right to initiate legislation is a wholly state-created right, we believe that the state may constitutionally place

nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation."). Because no speech was implicated by eliminating decriminalization of marijuana usage as the topic of the citizens' initiative, the D.C. Circuit accordingly declined to apply any level of First Amendment scrutiny to the challenged legislation.[6]

For the same reason, in *Wellwood v. Johnson*, 172 F.3d 1007 (8th Cir. 1999), the Eighth Circuit declined to strike down state laws requiring a higher percentage of voters to sign initiative petitions for "local-option elections" (38%) than initiative petitions on other subjects (15%). In these elections, Arkansas voters determine whether to change a county from "wet" to "dry" or vice versa. *Id.* at 1008. The Free Speech Clause of the First Amendment was not infringed by the higher percentage condition, the court of appeals concluded, because the statutes regulated the initiative process, not political speech. *Id.* at 1009. "[T]he statutes involved in this case in no way burden the ability of supporters of local-option elections to make their views heard." *Id.*

Referring to two equal protection cases, the Eighth Circuit suggested there may be First Amendment concerns if a statute – in addition to singling out one subject matter for heightened initiative requirements – had a discriminatory effect on minorities or other identifiable groups. *Id.* at 1010. But the Arkansas laws, which – like Utah's supermajority requirement – evenhandedly applied more stringent initiative conditions to advocates on both sides of

[6] Petitioners concede that the Tenth and District of Columbia Circuits are in harmony on this point. Pet. 12.

the "wet v. dry" issue, worked no such bias against a particular viewpoint or group. *Id.*

The Massachusetts constitutional provision challenged on free speech grounds in the third case Petitioners rely upon for a supposed circuit conflict completely excluded the subjects of religion and state aid to private institutions from the citizens' initiative process. *Wirzburger v. Galvin*, 412 F.3d 271, 276-77 (1st Cir. 2005), *cert. denied*, 126 S.Ct. 1165 (2006). The First Circuit nonetheless refused to apply strict scrutiny and upheld the provision. *Id.* at 276-77. Echoing the D.C. Circuit, the court noted that the plaintiffs, like Petitioners here, cited no "precedent for the proposition that, under the Free Speech Clause of the First Amendment, a state may not restrict the subjects that can be addressed through its initiative process." *Id.* at 278.

The result in *Wirzburger* is consistent with that in *Marijuana Policy Project* (to which it is most factually similar) as well as with those in *Wellwood*, the instant case, and prior Tenth Circuit precedent, *e.g.*, *Save Palisade FruitLands*, 279 F.3d at 1211 (holding free speech rights were not implicated by a Colorado law allowing citizens of "home rule" counties, but not citizens of "statutory counties," to initiate legislation).

Like these other circuits, even the First Circuit recognized that laws allowing citizens to legislate via initiatives, unlike those that regulate *how* citizens can promulgate their political views, do not *directly* regulate political speech. *Wirzburger*, 412 F.3d at 277. Instead, because in the court's view the total exclusion *indirectly* affected expression, it applied intermediate scrutiny; nevertheless, it ultimately upheld the Massachusetts

provision. *Id.* at 279. The First Circuit thus disagreed only with the D.C. Circuit's reasoning in *Marijuana Policy Project* that subject matter exclusions from the initiative process do not restrict speech at all, *id.* at 278, an argument the Massachusetts defendants apparently never raised. *See id.* at 276 (describing defendants as "arguing that only minimal rationality review is appropriate").

Significantly, this divergence in reasoning was touted in the unsuccessful Petition for a Writ of Certiorari filed in *Wirzburger*, which Petitioners inexplicably neglect to mention. The unsatisfied *Wirzburger* plaintiffs argued – as do Petitioners here, Pet. 9-13 – that the D.C. Circuit's failure in *Marijuana Policy Project* to apply any level of First Amendment scrutiny to the statute's content-based exclusions from the initiative process evidenced a certiorari-worthy circuit split. Petition for a Writ of Certiorari, 2005 WL 2738967 at **17-19, *Wirzburger v. Galvin*, U.S. No. 05-519. Yet this Court denied the petition in *Wirzburger* just a year ago.

During the intervening year, the only relevant addition to the legal landscape has been the Tenth Circuit's opinion below, joining the Eighth Circuit and the D.C. Circuit in declining to scrutinize under the First Amendment a condition imposed on the initiative enactment process that does not infringe political speech. That these circuits and the First have all reached consistent results does not suggest that discretionary review by this Court is necessary or appropriate. Moreover, the somewhat different "approach" used by the First Circuit in *Wirzburger* to nonetheless uphold the challenged initiative exclusion was extant when certiorari was recently denied in that case. It did not evidence a circuit split warranting this Court's attention then, and it does not do so now.

III. There is No Precedent For Invalidating Laws, Common Throughout the Country, that Require More Than a Majority Vote to Enact Legislation on Selected Topics.

The instant petition is essentially a frontal assault on supermajority requirements. Laws mandating supermajority votes are ubiquitous, required on selected issues in every state as well as in the federal constitution.[7] As this Court noted in *Gordon v. Lance*, 403 U.S. 1, 6 (1971), the Bill of Rights itself "removes entire areas of legislation from the concept of majoritarian supremacy." To highlight how common supermajority requirements are, the Tenth Circuit panel summarized state provisions drawn from a 105-page sampling provided by the *amici curiae*:

> State constitutions attach supermajority requirements to a bewildering array of specific categories of legislation, including appropriations bills, tax levies, bonding bills, debts, land use regulations, the salaries and discipline of state officials, district formation and redistricting, and judicial administration.

Pet. App. 36-37.[8] Under the Utah Constitution, for example, a ballot measure to move a county seat requires the support of two-thirds of those voting in order to be enacted. Utah Const. art. XI, § 2.

The Tenth Circuit recognized that the inevitable effect of these supermajority requirements is to discourage

---

[7] U.S. Const. art. I, §§ 3, 5, 7; *id.* art. II, § 1; *id.* art. V; U.S. Const. amend. XIV, § 3; *id.* amend. XXV, § 4.

[8] *See* Brief of *Amici Curiae*, Add. at 1-105, *Initiative and Referendum Institute v. Walker*, 10th Cir. Nos. 02-4105, 02-4123.

advocates of legislation on the selected topics. But it also cautioned that the First Amendment "does not ensure that all points of view are equally likely to prevail." Pet. App. 37-38. This conclusion echoes that of this Court in *Gordon*, involving a challenge to a law requiring 60 percent approval of the voters in a referendum election to incur bond indebtedness. The challengers argued that the law violated the Equal Protection Clause by giving votes of those favoring the bonds less weight than the votes of those opposed. *Gordon*, 403 U.S. at 3.

The Court acknowledged in *Gordon* that any departure from strict majority rule gives disproportionate power to the minority, but rejected the argument that the constitution requires that rule to apply on every political issue. 403 U.S. at 6. "So long as such [supermajority] provisions do not discriminate against or authorize discrimination against any identifiable class[9] they do not violate the Equal Protection Clause" or "any other provision of the Constitution." *Id.* at 7, 8. The supermajority requirement for bond indebtedness did not discriminate since it applied to all bond referenda and thus did not "dilute" votes based on either a group's characteristics or on how the group's members voted. *Id.* at 4. Moreover, the Court did not agree that singling out one subject matter for a supermajority requirement was impermissible, declaring that whether selected topics such as taxation or bonding are more important than other matters, requiring a greater-than-majority consensus, is more properly left to the States and the people to determine. *Id.* at 6.

---

[9] As examples of such a class, the Court noted that voting rights could not be based on "extraneous conditions," such as race, wealth, military status, or tax status. *Gordon*, 403 U.S. at 5.

Based on *Gordon*, the Court took action in numerous other cases pending on certiorari, ultimately upholding supermajority vote requirements in every instance. *See Bogert v. Kinzer*, 403 U.S. 914 (1971) (requiring two-thirds vote for general obligation bonds); *Brenner v. School Dist.*, 403 U.S. 913 (1971) (requiring two-thirds vote for school bond elections); *Mihaly v. Westbrook*, 403 U.S. 915 (1971) (requiring two-thirds vote for local bond issues); *Mize v. Alhambra City School Dist.*, 403 U.S. 927 (1971) (requiring two-thirds vote for school bonds); *Rimarcik v. Johansen*, 403 U.S. 915 (1971) (requiring 55 percent vote for home rule charter amendment). In the few cases since *Gordon* that have challenged a supermajority vote requirement under the Equal Protection Clause, the courts have done the same. *E.g.*, *Santa Clara County Local Transp. Auth. v. Guardino*, 902 P.2d 225, 228-29 (Cal. 1995) (requiring supermajority vote when a local government entity imposes a "special tax"); *In re Matter of Contest of Certain Special Election*, 659 P.2d 1294, 1295 (Ariz. App. 1982) (requiring two-thirds vote for bonding of rural road construction). The impact on voters from these validated statutes is the same as that from Utah's supermajority requirement for all wildlife initiatives.

Despite this – and without even discussing *Gordon* and its progeny – Petitioners insist that the "speech" of those voters who will favor passage of a future wildlife initiative will be discriminated against because their votes will carry only half as much weight as the votes of those opposed to its passage. Perhaps because the same discrimination argument was rejected in *Gordon*, Petitioners repeatedly stress the comments of pro-hunting Utah legislators who championed the original resolution eventually adopted by 56 percent of Utah voters. But, since the

facially neutral Utah constitutional provision has never been applied in a discriminatory manner or shown to disparately impact a protected group, the legislators' remarks are of no constitutional relevance. As this Court said, in refusing to consider allegedly illicit motives of legislators in a facial Free Speech Clause challenge to a statute banning draft card destruction, "We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

In sum, Petitioners urge a completely novel interpretation of the First Amendment as prohibiting supermajority requirements because they will dilute "political speech," i.e., votes in favor of initiatives subject to them. The same argument – though based on the Equal Protection Clause – was soundly rebuffed by this Court more than three decades ago. Since no court has ever adopted such an extreme expansion of the protections afforded by the First Amendment, it is apparent that Petitioners' issue is neither appropriate for, nor deserving of, consideration by the Court on discretionary review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General
ANNINA M. MITCHELL*
Utah Solicitor General
Attorneys for Respondents

**Counsel of Record*

January 2007

APPENDIX

Utah Constitution, Article VI, section 1 provides:

(1) The Legislative power of the State shall be vested in:

(a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and

(b) the people of the State of Utah as provided in Subsection (2).

(2)(a)(i) The legal voters of the State of Utah, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:

(A) initiate any desired legislation and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation, as provided by statute; or

(B) require any law passed by the Legislature, except those laws passed by a two-thirds vote of the members elected to each house of the Legislature, to be submitted to the voters of the State, as provided by statute, before the law may take effect.

(ii) Notwithstanding Subsection (2)(a)(i)(A), legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.

. . . .